New Developments in Military Capital Litigation: Four Cases Highlight the Fundamentals

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> [W]e will ensure that fundamental notions of due process, full and fair hearings, competent counsel, and above all, a "reliable result," are part of the equation. In the final analysis, we have heretofore examined, and shall continue to examine, the record of trial in capital cases to satisfy ourselves that the military member has received a fair trial.[1]

Introduction

The final months of the twentieth century witnessed a flurry of judicial activity in an area of military jurisprudence that has seen periods of seeming inactivity and sparse comment. In the eleven months between October 1998 and September 1999, the Court of Appeals for the Armed Forces (CAAF) issued opinions in four capital cases.[2] In two of the decisions the CAAF reversed the death sentences,[3] and in a third the CAAF affirmed the lower court's sentence reassessment awarding appellant life imprisonment.[4] In the fourth case, the CAAF affirmed the soldier's death sentence,[5] effectively joining his case with that of Inmate Dwight Loving who currently awaits presidential approval of his death sentence.[6] The decisions and opinions highlight the multifaceted and complicated issues inherent in military capital litigation. They also provide guidance, procedurally and substantively, with respect to the necessary steps required for a capital court-martial. The goal is that the ultimate result, one of such terminal consequence to the appellant, reaches the over-arching standard of "result reliability." This article discusses select issues from these recent decisions, highlights the CAAF's guidance with respect to these issues, and describes a recent change to Rule for Courts-Martial (R.C.M.) 1004.[7]

Background

In 1996 the United States Supreme Court addressed a soldier's appellate attack of the President's promulgation of the necessary aggravating factors for military capital sentences.[8] In *United States v. Loving*, the Court rejected the claim that the President, as Commander-in-Chief, lacked the requisite authority to promulgate by executive order the mechanism under R.C.M. 1004 that may yield a death sentence.[9] By its action, the Supreme Court affirmed the military's capital litigation process and, in rejecting Loving's claims, moved the case an additional

1. United States v. Murphy, 50 M.J. 4, 15 (1998). With this statement, then Chief Judge Cox reiterated an earlier reference to the Supreme Court's over-arching concern in capital cases: "One continuous theme is found throughout the death-penalty cases handed down by the Supreme Court over the last 30 years. That theme is reliability of result." *Id.* at 14.

2. These four cases involve the following personnel: Inmate Jose F.S. Simoy, Inmate James T. Murphy, Inmate Ronald A. Gray, and Inmate Ronnie A. Curtis. A fifth case, involving Inmate Dwight J. Loving, is largely beyond the scope of the purpose of this article. In *Loving v. Hart*, 47 M.J. 438 (1998), the CAAF denied a writ of mandamus filed by Inmate Loving after the Supreme Court had affirmed his capital conviction and sentence. *See* Loving v. United States, 517 U.S. 748 (1996). Several months after its denial of this writ, the CAAF subsequently denied Inmate Loving's petition for reconsideration. Loving v. Hart, 49 M.J. 387 (1998) (Effron, J., dissenting).

3. United States v. Simoy, 50 M.J. 1 (1998); *Murphy*, 50 M.J. at 4.

4. United States v. Curtis, 52 M.J. 166 (1999).

5. United States v. Gray, 51 M.J. 1 (1999).

6. *Loving*, 47 M.J. at 438. In accordance with Article 71, Uniform Code of Military Justice (UCMJ), Presidential review and action is required before a service member may be executed pursuant to a capital sentence. *See* MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 1203, 1204, 1207 (1998) [hereinafter MCM]. That the CAAF has affirmed Inmate Gray's capital conviction and sentence does not mean that procedurally his case is on par with Loving's. From a procedural perspective, Gray's case is behind Loving's and it appears that Gray has other appellate options that are no longer available to Loving (such as Supreme Court review).

7. MCM, *supra* note 6, R.C.M. 1004.

8. Loving v. United States, 517 U.S. 748 (1996). The facts of the case are briefly as follows: on 11 December 1988, Private Loving robbed two convenience stores in Killeen, Texas. His efforts produced less than $100. Thus, the next evening, he decided to rob taxi drivers. Pursuant to this plan, Private Loving robbed and shot to death a soldier moonlighting as a cab driver. Approximately fifteen minutes later, he robbed and killed another cab driver. Still later in the evening, Private Loving robbed and attempted to kill a third cab driver who resisted and fled. Upon his ultimate apprehension, Private Loving confessed to his crimes. At general court-martial, the panel convicted Loving of the two murders, the attempted murder and the five robberies. United States v. Loving, 41 M.J. 213, 229-231 (1994).

step closer to finality. In April 1998, the CAAF rejected Loving's writ of mandamus[10] and the Supreme Court subsequently denied yet another petition for certiorari filed by Loving.[11] For purposes of processing pursuant to the Uniform Code of Military Justice (UCMJ), the case is governed by Article 71.[12]

It remains to be seen what action the President will approve upon the required review of Loving's case. Pursuant to Article 71, the President acts as the final review, appeal and clemency authority for a soldier sentenced to death.[13] Upon presidential approval, a court-martial death sentence is ready for execution as the inmate's direct appellate options have largely been exhausted.[14] The only remaining option lies within federal habeas corpus proceedings.[15] While such proceedings are certainly a possibility after presidential approval of a capital sentence, the likelihood of successful habeas petitions at this stage is remote, especially given the apparent standard of review applied by the reviewing court.[16] Simply put, absent habeas relief, the matter of Inmate Loving's life and death lies in the hands of the Commander in Chief.[17]

Inmate Loving is not alone within the ranks of military personnel awaiting review and action with respect to their capital convictions and sentences. Currently, there are six military prisoners confined under a sentence of death at the United States Disciplinary Barracks, Fort Leavenworth, Kansas.[18] Each prisoner's case is procedurally postured at various stages in the appellate review process. The *Loving* decision alerts these appellants specifically and the military law practitioner generally that, at a minimum, the R.C.M. 1004 process passes

9. *Loving*, 517 U.S. at 769. Loving's attack first alleged that the Congress lacked the power to give the President this ability because the Constitution vests only in Congress the authority to "make Rules for the Government and Regulation of the land and naval forces." *Id.* at 758 (citing U.S. CONST. art. I, § 8, cl. 14). The Court rejected this and other arguments and found the delegation to the President to be lawful and his promulgation of R.C.M. 1004 within the four corners of that delegation: "There is nothing in the constitutional scheme or our traditions to prohibit Congress from delegating the prudent and proper implementation of the capital murder statute to the President acting as Commander in Chief." *Id.* at 769.

10. Loving v. Hart, 49 M.J. 387 (1998).

11. Loving v. Hart, 525 U.S. 1040 (1998).

12. UCMJ art. 71 (LEXIS 2000). Article 71 (a) provides that no death sentence may be executed until it has been approved by the President. Subpart (c)(1) further provides that a death sentence "may not be executed until there is a final judgment as to the legality of the proceedings." Judgment finality occurs when review has been completed by the respective Court of Criminal Appeals, the CAAF, and "review is otherwise completed in accordance with the judgment of the Supreme Court." *Id.* art. 71 (c)(1)(C)(iii). In accordance with R.C.M. 1204(c)(2) and (4) after judgment finality occurs, the service Judge Advocate General shall transmit the case "to the Secretary concerned for the action of the President." Notwithstanding that rule's mandatory inclusion of the Service Secretary, R.C.M. 1205 appears to allow direct transmittal, after action by the Supreme Court, to the President. The President may, per R.C.M. 1207, approve execution of the death sentence or, per Article 71(a), commute the death sentence. *Id.*

13. *Id.* The last service member to be executed by the United States military was Army Private First Class (PFC) John A. Bennett who had raped and attempted to murder a young girl while stationed overseas. Pursuant to Article 71, President Eisenhower approved Bennett's death sentence on 2 July 1957 but the execution did not occur until 13 April 1961, after President Kennedy had denied Bennett's telegram plea for clemency. *See generally* Captain Dwight H. Sullivan, *The Last Line of Defense: Federal Habeas Review of Military Death Penalty Cases*, 144 MIL. L. REV. 1 (1994) (discussing the process that accompanied the Bennett execution).

14. The *Bennett* case, post presidential approval, provides an interesting study in the efforts that may be undertaken to prevent execution of a military death sentence. After President Eisenhower's decision, PFC Bennett tried twice to obtain habeas relief from the United States District Court for the District of Kansas, appealed those decisions unsuccessfully to the United States Court of Appeals for the Tenth Circuit, and also failed to obtain from the CAAF a successful petition for a writ of error coram nobis. *See* Sullivan, *supra* note 13, at 3 (citing Bennett v. Cox, 287 F.2d 883 (10th Cir. 1961); Bennett v. Davis, 267 F.2d 15 (10th Cir. 1959)).

15. "[A] petition for a writ of habeas corpus remains a viable means to challenge a military death sentence." *Id.* at 11. "[F]ederal courts normally will not entertain habeas petitions by military prisoners unless all available remedies have been exhausted." *Id.* at n.13 (citing Schlesinger v. Councilman, 420 U.S. 738, 758 (1975)). Sullivan notes further that the statutory authority for the military habeas process, 28 U.S.C. § 2241, has been "expressly noted" by the Supreme Court as providing "'federal civil courts' with habeas corpus jurisdiction over military death penalty cases." Sullivan, *supra* note 13, at 7 & n.20 (citing Burns v. Wilson, 346 U.S. 137, 139, & n.1 (1953)).

16. The Tenth Circuit courts, because they serve the area within which the United States Disciplinary Barracks is located (the district of Kansas), are the courts whose case law "will govern habeas corpus review of military capital cases." *Id.* at 17. However, at least as of a decade ago, the Tenth Circuit Court of Appeals noted that its "precedent concerning the scope of review in military habeas cases is in a 'confusing state.'" *Id.* at n.70 (citing Dodson v. Zelez, 917 F.2d 1250, 1252 (10th Cir. 1990)). The current standard the court employs is the "full and fair consideration" standard posed by the plurality opinion of the Supreme Court in *Burns v. Wilson*, 346 U.S. at 144. "[I]t is the limited function of the civil courts to determine whether the military have given fair consideration to each of [the petitioner's] claims." Sullivan, *supra* note 13, at 14. However, according to Sullivan, the court so narrowly restricts this test that only a "rare case, indeed . . . would qualify for review." *Id.* at 22. The Tenth Circuit courts continue to follow this approach. The review is limited to the following four questions:

> whether the claimed error is of substantial constitutional dimension; (2) whether a legal, rather than a factual, issue is involved; (3) whether military considerations may warrant different treatment of constitutional claims such that federal civil court intervention would be inappropriate; and (4) whether the military courts have given adequate consideration to the claimed error and applied proper legal standards.

Seaver v. Commandant, United States Disciplinary Barracks, 998 F. Supp. 1215 (D. Kan. 1998) (citing *Dodson*, 917 F.2d at 1252-53). Perhaps Inmate Loving's case will clarify the courts' approach if, in fact, he seeks habeas review in the Tenth Circuit. However, regardless of the standard employed, absent a successful habeas petition, upon presidential approval no appellate process will exist to halt execution of sentence.

legal muster. What remains then from an analysis of recent appellate decisions are those substantive and case specific issues that provide lessons learned for future cases. The following section reveals the CAAF's recent disposition of such issues. Taken together, the cases present a military capital litigation primer—a basic subject matter approach not unlike that used in a freshman college course. From the military judge's role regarding instructions to the performance of defense counsel to the appellate review process and to the authority of the appellate courts, each case highlights the requisite fundamentals.

United States v. Simoy and Capital Courts-Martial Trial Procedure 101: "The Four Gates"

In 1992, a general court-martial convicted and sentenced to death Senior Airman Simoy for the offenses of conspiracy to commit robbery, robbery, felony murder, attempted murder, and desertion terminated by apprehension.[19] Simoy, a security policeman at Anderson Air Force Base, Guam, planned an ambush of a commissary worker as that person made a night deposit of the business day's receipts.[20] Simoy recruited his brother and friends to assist him and chose the Christmas holiday period to effect the conspiracy as that time had the potential to produce the most lucrative results.[21] On 29 December 1991, Simoy and his gang robbed a commissary worker of approximately $34,000 and attacked two Air Force noncommissioned officers, killing one.[22]

At trial, Simoy's defense counsel argued that information concerning the civilian murder trial of Simoy's brother should have been provided to the panel.[23] The military judge overruled this argument and found that such information would result in a "misleading and confusing" subset or "mini-trial" of Simoy's court-martial that went "far beyond its probative weight."[24] In his sentencing case, the civilian defense counsel submitted two documents, one of which was Simoy's three and one-half page apology, and called no live witnesses.[25] Finally, in his sentencing instructions, and without objection by either side, the military judge reversed the procedure with respect to the order panels address and vote on proposed sentences.[26] The Air Force Court of Criminal Appeals examined these issues as

17. Since the *Bennett* case, only one additional capital court-martial case has proceeded through the Article 71 phase. In *United States v. Henderson*, 11 C.M.A. 556 (1960), President Kennedy, acting on advice of the Secretary of the Navy and contrary to the advice of the Judge Advocate General of the Navy, commuted a death sentence to confinement for life for a service member whose case presented "a reasonable possibility that his mentality is impaired." Sullivan, *supra* note 13, at n.10 (citing a 5 December 1960 memorandum to the Secretary of Defense from the Secretary of the Navy contained in the *Henderson* record of trial. Sullivan further notes that the Secretary of Defense and the Attorney General concurred in this recommendation. These two officials are not expressly included in the current Article 71, R.C.M. 1204, 1205 and 1207 review and action process). The passage of nearly forty years since the *Henderson* case, coupled with the changes to the *Manual for Courts-Martial* in 1984, arguably create, with respect to Article 71 procedures and the *Loving* case, an issue of first impression. While the *Manual for Courts-Martial* provides a template for presidential review and action in a military death sentence case, that template does not necessarily foreclose input and action by other agencies. For example, could a military death sentence, approved by the President, make its way to the U.S. Department of Justice Pardons Office for input and recommendation? One observer has so questioned and notes further that such office could begin an investigation to be conducted by the Federal Bureau of Investigations the results of which could accompany a recommendation to the President to use his power to pardon the service member. *See* David E. Rovella, *Closing Ranks on Executions, Military nears first death penalty since JFK; Policy assailed*, THE NAT' L.J. 3 (Apr. 5, 1999). Finally, as was the case in *Henderson*, the President could solicit the input and recommendations of not only the Secretary of Defense and the Attorney General, but also that of the Department of Defense General Counsel and the Army General Counsel. The concomitant additional review and analysis of the subject death sentence would add even more credibility to the ultimate conclusion that the court-martial had produced a "reliable result."

18. Electronic Interview with Lieutenant Colonel Alan L. Dunavan, Command Judge Advocate, Headquarters, U.S. Army Disciplinary Barracks, Fort Leavenworth, Kansas (Apr. 4, 2000). Three of the prisoners are soldiers: Inmates Loving, Gray, and Kreutzer; and three are Marines: Inmates Walker, Parker, and Quintanilla. Inmate Murphy, whose case and death sentence the CAAF remanded to the Army court for further review, also remains housed on death row. Gray and Murphy were court-martialed in 1987 for their offenses. Inmate Loving was tried in 1989. Walker and Parker were court-martialed in 1992, Kreutzer was court-martialed in 1995, and Quintanilla was court-martialed in 1996.

19. United States v. Simoy, 46 M.J. 592, 601 (A.F. Ct. Crim. App. 1996).

20. *Id.* at 599.

21. *Id.*

22. *Id.* at 600. Simoy's brother Dennis killed one of the men by beating his head with a lead pipe and another gang member stabbed and viciously slashed the other victim with a knife. Although not the actual murderer (or the man who knifed the second victim), Simoy was a link between planning and execution of the assaults. As the ambush began, one of the conspirators asked "Jose, what if the guy dies?" Simoy responded, "If the guy dies, he dies." *Id.* Later, when the second victim happened upon the scene, another conspirator asked, "Jose, there's a guy in a car. Do we have to kill him?" Simoy responded twice, "Yeah, kill him." *Id.* In addition to the cash, the gang obtained approximately $40,000 in food stamps and checks. *Id.* at 601.

23. Dennis Simoy, at the time of his brother's court-martial, faced a sentencing hearing, as he had already pleaded guilty to robbery and murder. He was tried in the United States District Court for the Territory of Guam wherein the maximum sentence he faced was a mandatory life sentence. *Id.* at 608.

24. *Id.* at 609.

25. *Id.* at 603. The other document merely explained Simoy's efforts to secure a pretrial agreement. In argument, counsel informed the members of Simoy's wife and three children as well as of other family members.

well as the issue of sentence appropriateness and affirmed the findings and sentence.[27]

The CAAF agreed with the Air Force court on all the findings issues but disagreed as to the issue concerning the military judge's failure "to instruct the members to vote first on the lightest proposed sentence."[28] The CAAF found this failure to be plain error, affirmed the findings, set aside the sentence and returned the case to The Judge Advocate General of the Air Force with the authority to conduct a sentence rehearing.[29] In the opinion of the CAAF, Judge Crawford notes: "[I]n order for the death penalty to be imposed in the military, four gates must be passed . . . ."[30] Those gates are as follows:

> (1) The panel members must find unanimously that the accused is guilty of a death eligible offense.[31]
> (2) The panel members must find unanimously beyond a reasonable doubt that at least one qualifying aggravating factor exists.[32]
> (3) The panel members must unanimously concur that any aggravating factors substantially outweigh any mitigating factors.[33]
> (4) The panel members must unanimously vote for the death penalty as the sentence for the accused.[34]

Judge Crawford reiterates that unanimity of decision is required at every gate in the process and that the military judge's instructions must "make these four gates clear" to the members.[35] Finally, and perhaps most important of all, the military judge must impart to the members that even if they successfully clear gates one through three, they are not allowed to vote on the death penalty first if any member has proposed a lesser sentence.[36]

The CAAF's guidance in *Simoy* underscores a specific fundamental requirement of the military judge regarding sentencing instructions and procedure as provided in R.C.M. 1006: the members must be informed that they must vote on the proposed sentences beginning with the least severe and moving to the next least severe until the required number of members has agreed.[37] It is the duty of the military judge in a capital case to ensure that the members are informed and understand that they may propose lesser sentences and, if so propose, must vote on such sentences before reaching a vote for death.[38] The members must know this specifically as to sentencing and must appreciate generally that in a capital case, "because of requirements for unanimous votes, any one member at any stage of the proceeding could have prevented the death penalty from being imposed."[39] From such procedural perfection may come a result that is reliable in a military capital case.[40]

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26. *Id.* at 614. The actual instruction was as follows: "If the aggravating circumstance has been found unanimously by proof beyond reasonable doubt, and if one or more members proposed consideration of the death sentence, begin your voting by considering the death sentence proposal, which have the lightest additional punishment if any." United States v. Simoy, 50 M.J. 1, 2 (1998).

27. *Simoy,* 46 M.J. at 599. The court concentrated on the issues of ineffective assistance of counsel (pretrial and during the merits and sentencing phases of trial), the sentencing instructional errors, and sentence appropriateness. The court opined that the remaining forty-five issues asserted on appeal had largely been "laid to rest" by the Supreme Court in the *Loving* decision. *Id.* at 601.

28. *Simoy,* 50 M.J. at 2.

29. *Id.* at 3. According to the Air Force's Appellate Defense Division, on rehearing Simoy received a life sentence that has subsequently been approved by the convening authority. Telephonic Interview with Major Thomas R. Uiselt, U.S. Air Force Appellate Defense Division (Apr. 10, 2000).

30. *Simoy,* 50 M.J. at 2. This is not the first CAAF death penalty opinion to refer to the requisite stages in the process as "the four gates." In *Loving v. Hart*, 47 M.J. 438 (1998), decided eight months before the *Simoy* decision, Judge Gierke notes that the "military capital sentencing procedure set out in R.C.M. 1004 and 1006 establishes four 'gates' to narrow the class of death-eligible offenders." *Id.* at 442. He further notes that the first two gates involve unanimous votes as to conviction for a death eligible offense and the existence of at least one aggravating factor and then describes the third gate as the "weighing" gate. He concludes that an accused becomes "death eligible" only after the case has moved through the three gates and then he refers to the final gate as "the sentencing decision itself." *Id.*

31. MCM, *supra* note 6, R.C.M. 1004(a)(2).

32. *Id.* R.C.M. 1004(b)(7).

33. *Id.* R.C.M. 1004(b)(4)(C).

34. *Id.* R.C.M. 1006(d)(4)(A).

35. *Simoy,* 50 M.J. at 2.

36. *Id.*

37. MCM, *supra* note 6, R.C.M. 1006(d)(3)(A).

United States v. Murphy and Effective Assistance of Counsel 101: Nobody's Perfect but . . .

In *United States v. Murphy*,[41] the CAAF faced ninety-one issues but focused its opinion on jurisdiction, several claims of ineffective assistance of counsel, and claims of newly discovered evidence with respect to appellant's mental responsibility.[42] In a 3-2 decision, the CAAF resolves the jurisdictional issue against Murphy but determines that it is "satisfied that appellant did not get a full and fair sentencing hearing."[43] As a result, the court sets aside the Army court's decision and returns the record of trial to the Army Judge Advocate General for remand to the lower court for further review.[44]

At court-martial, Murphy's defense counsel faced a daunting task given the facts presented by the government. For a period of time, Murphy had been married to Petra Murphy, a German national, and had fathered a son with her.[45] Petra Murphy also had another son, Tim, from an earlier marriage.[46] German police discovered the bodies of these three people on 23 August 1987, in Petra Murphy's off-post apartment.[47] Upon his apprehension at Redstone Arsenal, Alabama, and several days later after his return to Germany, Murphy confessed to killing his family.[48]

The Ineffective Assistance Claims: Pretrial, During, and Posttrial

Prior to trial in December 1987, Murphy spent several months confined in the Mannheim Confinement Facility, Germany.[49] While there, he confessed to two inmates, one of whom, Private Michael French, later testified against Murphy at his court-martial.[50] French, upon hearing Murphy's confession, reported what he heard to his detailed military defense

38. But what about the situation where panel members request clarification of voting instructions? How far a judge must go to clarify jury questions regarding instructions was reached by the U.S. Supreme Court in a recent decision. In *Weeks v. Angelone*, 120 S. Ct. 727 (2000), the justices decided, 5-4, that a trial judge's refusal to do more than to refer the jury to pattern instructions he had given before deliberations was permissible and constitutionally sound. The question addressed whether the jury had to decide on death as a sentence after it had found at least one aggravating factor. The judge did not expand or improve on the pattern instruction regarding the relationship between aggravating factors and mitigating circumstances and instead directed the jurors to the pattern instruction he had already given them. In their dissent, Justices Stevens, Ginsburg, Breyer, and Souter maintain that the pattern instruction itself was ambiguous and that the judge needed to do more than merely repeat that instruction ("a simple, direct answer to the jury's question would have avoided the error") *Id.* at 738 n.5. Military judges, mindful of their responsibilities with respect to shepherding the panel through the four gates at capital courts-martial, are well-advised by *Simoy* and *Weeks* that the better course is to provide clarity and meaningful response to instructional questions.

39. *Simoy*, 50 M.J. at 3.

40. In their concurring opinions, Judges Sullivan, Gierke, and Effron write to convey their view that the military judge erred in excluding information regarding the maximum possible sentence that Simoy's brother faced in federal civilian court (that is, mandatory life sentence). Judge Sullivan notes that "to hold the triggerman's fate [Simoy's brother] is irrelevant in appellant's case, a nontriggerman participant in the same murder, ignores applicable federal practice without reason." *Id.* at 3 (citing UCMJ art. 36). Judge Gierke agrees with this notion: "Congress considers the sentence of a co-actor relevant in federal capital cases." *Id.*

41. United States v. Murphy, 50 M.J. 4 (1998).

42. *Id.* at 6.

43. *Id.* at 15. On appeal, Murphy attacked the jurisdictional aspect of his case in three ways: first, he alleged ineffective assistance of counsel because his detailed military defense counsel were prohibited from representing him in jurisdiction negotiations with the German authorities. Second, he alleged the German authorities were mistaken as to the issue of whether the victims were his dependents and thus American authorities illegally acquired jurisdiction of the case. Finally, he alleged he was prejudiced by the process and offered correspondence between German and American authorities establishing that the Germans would not have released jurisdiction "if they had not been mistaken about the true facts." *Id.* at 6, 7. The court resolves the issues primarily on the basis of the existence of in personam jurisdiction that flowed from Murphy's status as a soldier and adds the performance of his counsel on this matter to the pot from which the court brews up its opinion as to counsels' competence. *Id.* at 8 (referring to United States v. Solorio, 483 U.S. 435 (1987); Loving v. Hart, 47 M.J. 438 (1998)).

44. *Id.* The options for the Army court from this remand order include: (1) review the "newly discovered evidence" to determine if different findings might reasonable result; (2) if the record is inadequate, order a rehearing, pursuant to *United States v. DuBay*, 37 C.M.R. 411 (1967), to consider the factual issues raised on appeal as to findings; (3) if no different findings verdict would reasonably result, affirm Murphy's sentence only as to life imprisonment; or (4) order a rehearing as to the death sentence. *Id.* at 16.

45. *Id.* at 6.

46. *Id.* at 30.

47. *Id.* at 6.

48. *Id.* In her dissent, Judge Crawford comments "I find it telling that the majority gives short shrift to a discussion of the evidence in this case." *Id.* at 29 (Crawford, J., dissenting). To buttress her contention that Murphy was not prejudiced by his counsels' performance, Judge Crawford recounts the facts of this case in greater detail than does the majority. *Id.* at 29-30 (Crawford, J., dissenting). Petra and appellant had been estranged for some time prior to the murders and were involved in a contentious dispute over financial support. *Id.* at 29 (Crawford, J., dissenting). During this time, Murphy allegedly remarked to other soldiers "if he had to pay alimony he was going to kill her." *Id.* (Crawford, J., dissenting). In a series of ever-increasingly incriminating statements, Murphy ultimately recounted that on the day of the murders, he went to his ex-wife's apartment, repeatedly struck Petra with a hammer, and placed her and the two children into a bathtub where they died by drowning. *Id.* at 30 (Crawford, J., dissenting).

counsel, Captain (CPT) Schneller.[51] Captain Schneller later negotiated a pretrial agreement for his client, Private French, and then successfully moved to withdraw from further representing French at his court-martial.[52] At the same time he assisted Private French, CPT Schneller was also serving as Murphy's Assistant Defense Counsel (ADC).[53] At Murphy's court-martial, Private French testified as a government witness, providing additional evidence regarding Murphy's motive behind the killing of his biological son.[54] Neither Murphy's lead defense counsel, CPT Vitaris, nor the ADC, CPT Schneller, cross-examined French on this damning evidence.[55]

Prior to trial, the defense team, faced with multiple confessions and a determination by a sanity board that Murphy presented no mental issues to estop prosecution, concentrated on undermining the validity of the confessions and also prepared for a sentencing case.[56] The merits strategy failed and the sentencing efforts (also an ultimate failure), comprised merely telephonic and written correspondence with Murphy's family and friends in the United States.[57]

Over five years after the court-martial, appellate defense counsel, using funds approved by The Army's Judge Advocate General, procured a "post-trial social history."[58] This investigation uncovered "new matters" regarding Murphy's background and also included medical opinions that Murphy indeed suffered from organic brain damage that may have resulted from fetal alcohol syndrome.[59]

Assessing these facts under the Supreme Court's two-pronged test for ineffective assistance of counsel claims,[60] Judge Cox, writing for the majority, finds that the record of trial as well as the numerous posttrial affidavits submitted by a series of appellate counsel yields only one conclusion: Murphy did not receive effective assistance of counsel with regard to his sentencing case.[61] To support that conclusion, Judge Cox cites four reasons: first, the defense counsel "were neither educated nor experienced in defending capital cases, and they either were not provided the resources or expertise to enable them to overcome these deficiencies, or they did not request same."[62] Second, the unexplained conflict of interest that arose from CPT Schneller's simultaneous representation of a soldier who faced a capital court-martial and a witness who later testified against him, leaves "the question whether this conflict of interest had any impact on the sentencing proceedings . . . unresolved."[63] Third, the defense counsels' cursory investigation of Murphy's "traumatic family and social history"[64] affords the court the belief that, combined with a lack of training and experience,

49. *Id.* at 6.

50. *Id.* at 10.

51. *Id.*

52. *Id.* The military judge who granted the motion to withdraw also presided over French's ultimate court-martial as well as over Murphy's.

53. *Id.*

54. *Id.* at 11.

55. *Id.* at 10.

56. *Id.* at 12.

57. *Id.* at 12, 13. The CAAF notes further with disbelief that the defense team, because of communications problems with military phone lines, had to seek the permission of the lead prosecutor in order to make commercial calls back to the States. *Id.* at 9 n.1.

58. *Id.* at 13.

59. *Id.* at 14.

60. *Id.* at 8. The test is as follows:

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

Strickland v. Washington, 466 U.S. 668, 687 (1984).

61. *Murphy*, 50 M.J. at 5.

62. *Id.* at 9.

63. *Id.* at 11. Judge Cox observes that the Army court decided this issue exclusively on the basis of examining the affidavits submitted by Murphy and the defense counsel and finding the defense counsels' submissions to be more credible. Per Judge Cox, this "questionable practice of resolving pure disputes of material fact" is contrary to the CAAF precedent. *Id.* at 11 (citing United States v. Ginn, 47 M.J. 236 (1997)).

such efforts were "questionable tactical judgments, leading us to the ultimate conclusion that there are no tactical decisions to second-guess."[65] Finally, regarding the posttrial "newly discovered" psychiatric evidence,[66] the court determines that it cannot assess the impact such evidence may have had in sentencing as it "has not been tested in the crucible of an adversarial proceeding."[67]

Judge Cox observes that the CAAF's scrutiny of the defense counsels' performance is assisted by not only the posttrial absence of "the fog of battle, but it is also clarified by the guiding lights of aggressive appellate counsel."[68] He insists that the court is "not looking for perfection, but rather we are seeking to ensure that military accused are represented by 'reasonably competent' counsel, and that the results obtained at trial are reliable."[69] Armed with the facts and issues springing from nearly a decade of appellate spadework, Judge Cox concludes "there are too many questions" unanswered to ascertain that Murphy received "a full and fair sentencing hearing."[70]

Murphy reveals obvious case-specific issues regarding the performance, generally, of defense counsel but it also provides a valuable look at the expectations demanded, specifically, of capital courts-martial advocates. If, indeed, perfection in performance is not the "watchphrase," something not too far from it must certainly be found in order to arrive at "result reliability." Given the potential terminal consequence of a capital court-martial, defense counsel are well-advised by *Murphy* to seek out training, assistance, expertise, resources, and any other help possible in order to glean all that may be had from thorough, and perhaps exhaustive, research and investigation of the case and its facts and issues.

The decision also conveys the notion that defense counsel are not alone in this process. Indeed, the military judge must be sensitive to problem areas that he knows or reasonably should know of and government counsel are equally put to task to ensure a clean record. The conflict of interest issue in *Murphy* is a prime example of failures of all parties to clarify and perhaps resolve, on the record, an issue of tremendous potential impact on the efficacy of the ultimate result. Had the military judge—the same one who had tried Murphy and the witness, French—asked counsel and Murphy whether they had discussed the matter then this issue might not have survived the trial.[71] The case, its issues and the lessons learned from it make *Murphy* a "must-read" before defense counsel launch into a capital case performance.

United States v. Gray and Appellate Review Fundamentals 101: Lengthy Process + Lengthy Consideration = Reliable Result

In *United States v. Gray,*[72] the CAAF, in another 3-2 split among the judges, affirms the findings and death sentence for a soldier whose general court-martial convicted him of two premeditated murders, one attempted premeditated murder, three rapes, two robberies, two forcible acts of sodomy, burglary, and larceny.[73] Writing for the majority, Judge Sullivan notes that the opinion is, by necessity, a long one "because we feel it is necessary to explain our resolution of the numerous issues involved in this case."[74] Those issues, numbering 101, include systemic challenges, case-specific issues, and issues personally assigned by the appellant.[75] The CAAF resolves all of them against the appellant.[76] Judges Effron and Cox dissented, believing that the military judge committed clear error with

64. *Id.* at 10 (citing to Issue XVI of appellant's brief at Appendix, p.18).

65. *Id.* at 13.

66. *Id.* at 15.

67. *Id.*

68. *Id.* at 8.

69. *Id.* (citing Strickland v. Washington, 466 U.S. 668 (1984);United States v. Polk, 32 M.J. 150 (C.M.A. 1991)).

70. *Id.* at 15. In their dissents, Judges Sullivan and Crawford take issue with what they perceive to be an absence of legal authority to support the majority's conclusions. Judge Sullivan laments the majority's reversal of a death sentence obtained eleven years prior and sees "no legal basis upon which the majority can reverse this case because the defense attorneys might have been better trained." *Id.* at 27 (Sullivan, J., dissenting). While he does not comment on the conflict of interest issue, Judge Sullivan focuses on the latent developed mental issues and believes that the majority's decision "generally allows mental responsibility to be an open question, practically forever." *Id.* at 28 (Sullivan, J., dissenting). Finally, he concludes by disagreeing with the majority's "'too many questions' standard of appellant [sic] review." *Id.* at 29 (Sullivan, J., dissenting). While Judge Sullivan concedes that "death penalty cases must be closely scrutinized" he also observes such cases "should not be allowed to continue forever." *Id.* at 28 (Sullivan, J., dissenting). Judge Crawford finds no prejudice to Murphy flowing from the conflict of interest issue and determines that defense counsels' failure to investigate further Murphy's childhood background and mental health was "reasonable, based upon the information provided to them by appellant and his witnesses." *Id.* at 34 (Crawford, J., dissenting). In Judge Crawford's view, case law does not support the majority's conclusion that defense counsel, by their inexperience, were ineffective and she concludes that "the strong evidence of appellant's sanity, [makes it] unlikely that the post-trial psychiatric report would have convinced the members to acquit him, even if it had been presented to them." *Id.* at 35 (Crawford, J., dissenting).

71. According to the CAAF, the conflict of interest issue "could have been resolved at trial by the simple exercise of CPT Schneller reminding the military judge of the prior representation, and by the judge conducting a suitable inquiry of counsel and appellant on the record." *Id.* at 11.

72. 51 M.J. 1 (1999).

respect to the trial counsel's peremptory challenge of a minority panel member.[77]

Gray's court-martial occurred over a period of several months from December 1987 to April 1988.[78] The convening authority approved the findings and death sentence on 29 July 1988 and forwarded the record of trial to the Army's Defense Appellate Division the following week.[79] Appellate defense counsel filed their first pleadings over one year later and in February 1990 the Army Court of Criminal Appeals (then the Army Court of Military Review) ordered that Gray submit to a sanity board.[80] The following June, the board found no mental responsibility or competency issues in existence then or when Gray committed his offenses, and in July the government appellate counsel filed their answer.[81]

From late December 1990 to October 1991, Gray's appellate counsel sought several times appellate court orders directing the government to provide $15,000 for several experts to conduct psychological, legal, and social history investigations.[82] The Army court denied the motion in March 1991 and denied a reconsideration request the following August.[83] Undaunted by the failure to convince the Army appellate judges, counsel filed a petition requesting the CAAF order the government to provide $10,000 and to issue an emergency stay of the proceedings before the lower court.[84] The CAAF denied both requests in October 1991, and in December 1991, the Army court, pursuant to another request by Gray, ordered military authorities to conduct a battery of psychological tests.[85] The resultant report, notwithstanding its ultimate conclusion that Gray was currently sane and was so when he committed his offenses, prompted defense counsel to petition for a new trial based on "newly discovered evidence of lack of mental responsibility."[86]

In February 1992, defense counsel filed supplemental errors, the Army court heard oral argument in April, and the following December the court denied the petition for new trial and affirmed the case.[87] That month, Gray's counsel filed yet another motion for funding as well as a petition for reconsideration of the court's case decision. The Army court denied both the following month, denied an *en banc* request in March of 1993, allowed the supplemental filing of additional errors, and again affirmed the case in June of 1993.[88] Although ordered by

73. *Id.* at 9. Gray was also convicted by a North Carolina state court for the additional murders and rapes of two other victims as well as for a number of other related offenses. He pleaded guilty to those offenses and received three consecutive and five concurrent life sentences. United States v. Gray, 37 M.J. 730, 733 & n.1 (A.C.M.R. 1992).

74. *Gray*, 51 M.J. at 11. As was the case in *United States v. Murphy*, 50 M.J. 4 (1998) (wherein Judges Sullivan and Crawford dissented), Judge Gierke provides the third vote for the majority, this time joining Judges Sullivan and Crawford to affirm the findings and death sentence.

75. *Id.* Gray's appellate counsel briefed seventy issues for the CAAF's consideration. These included several issues centering on the information that was available to the panel regarding Gray's mental health; newly discovered evidence alleging that Gray suffers from organic brain damage; the denial of competent psychiatric assistance before and during trial; ineffective assistance of counsel for failure to investigate more thoroughly Gray's family, social, and medical histories; and a multitude of systemic issues regarding the military's capital court-martial process. Gray personally asserted thirty-one additional issues for the court's consideration.

76. *Id.* at 64.

77. *Id.* at 65. Judges Effron and Cox dissent because the military judge did not require the trial counsel to articulate a race neutral reason for his decision to peremptorily challenge a Major Quander, who, like Gray, is an African-American. *Id.* (citing Batson v. Kentucky, 476 U.S. 79 (1986)). The majority resolves this issue against Gray, finding that (a) *Batson* did not yet apply at courts-martial when this case was tried, (b) the trial counsel in fact offered a race-neutral explanation for his challenge, and (c) the judge, while not expressly ruling, "clearly stated his satisfaction with trial counsel's disavowal of any racist intent in making the challenge." *Id.* at 35.

78. *Id.* at 9.

79. *Id.* The Defense Appellate Division received the record of trial on 8 August 1988. *Id.*

80. *Id.* at 9.

81. *Id.*

82. *Id.* Counsel specifically sought "an expert psychiatrist, a death-penalty-qualified attorney, and an investigator." *Id.*

83. *Id.*

84. *Id.*

85. *Id.*

86. *Id.*

87. *Id.* (citing United States v. Gray, 37 M.J. 730 (A.C.M.R. 1992)).

88. *Id.* at 10.

the CAAF to file final briefs by summer's end, Gray's counsel did not do so until June of 1994.[89] During that period of time the CAAF denied another funding request and granted the lead appellate counsel's motion to withdraw.[90] The CAAF heard oral argument in March 1995, allowed the supplemental filing of additional issues after the U.S. Supreme Court issued its opinion in *Loving*, and heard oral argument again in December 1996.[91]

By virtue of the foregoing lengthy appellate process in this case, several issues came to light posttrial and their investigation, discussion and resolution enhances the reliability of the CAAF's ultimate conclusions. Many of the latent developing issues are independent of each other but several of them are threaded to a tapestry of ineffective assistance of counsel that appellate counsel weave throughout their contentions. The CAAF addresses all the issues, but as to the ineffective assistance theme the CAAF specifically disagrees with Gray's contentions and finds that counsel rendered a performance that is neither defective nor inadequate.[92]

The CAAF first addresses a supplemental issue, filed after the Supreme Court's *Loving* decision, wherein counsel allege that the reach of *Solorio* (insofar as that case does not require a service-connection in order to obtain jurisdiction over a service member) extends only to non-capital cases.[93] The CAAF agrees that *Solorio* provides "an important question" regarding whether a service-connection must be established in a military capital case but ultimately determines that such question "need not be decided" in this case.[94] For the CAAF, the facts provide a "sufficient service connection" such that the issue of jurisdiction, even if it were to necessitate a *Solorio* analysis, is resolved against Gray.[95]

The ineffective assistance claims spring from the posttrial discovery of Gray's mental problems as well as from the posttrial development of the sentencing case. In four phases Gray attacks his counsels' performance. First, he alleges that his lawyers failed adequately to investigate his "family, social, and medical histories and [his] intoxication at the time of the offenses."[96] Second, he attacks his counsels' failure to challenge the competence of the psychiatrists who evaluated his mental health pretrial.[97] Third and fourth, he alleges that his attorneys rendered inadequate performances on the merits and in sentencing.[98] The CAAF found that he failed in all attacks.

Recall that the posttrial development of Gray's various "histories" evolves with the passage of time and that the results produced come from the zealous and energetic efforts of appellate counsel. In fact, the results, called by counsel a "wealth of evidence in mitigation,"[99] reveal a more complete picture of Gray's mental health and enhance an analysis of his mental responsibility at the time he committed his offenses. While the CAAF does not "welcome descent into the 'psycho-legal' quagmire of battling psychiatrists and psychiatric opinions,"[100] it surely welcomes the additional clarity that enables it to resolve the issue. Moreover, the newly discovered evidence enhances its review of the case in general as well as the specific allegations of ineffective assistance at the various phases of the case.

The investigative and research efforts achieved by counsel and the courts during *Gray*'s appellate history (a history that encompasses the passage of nine years from Gray's commission of the offenses until final arguments before the CAAF), renders a conclusive analysis of a multitude of issues. Those efforts and that investigation also produce a valid appellate determination that Gray's death sentence can only be described as a "reliable result."[101] It is common knowledge not only that

89. *Id.*

90. *Id.*

91. *Id.* During this period of time, the CAAF granted the withdrawal motion of yet another lead appellate defense counsel.

92. *Id.* at 18.

93. *Id.* at 11 (citing Solorio v. United States, 483 U.S. 435 (1987)).

94. *Id.*

95. *Id.*

96. *Id.* at 18.

97. *Id.* at 19.

98. *Id.* Although not expressly alleged by counsel on appeal, one can surmise that the ineffective assistance argument extends also to the failure to procure the necessary funds for investigation and expertise and also to the failure to argue *Batson* when the military judge failed to comply with its dictates. As is the case with the other ineffective assistance issues, both of these issues developed post-trial.

99. *Id.* at 15.

100. *Id.* at 17.

101. United States v. Murphy, 50 M.J. 4, 15 (1998).

a rush to judgment often produces flawed results but that the passage of time can produce an end product of greater reliability. *Gray* and its history suitably supports that latter contention, as is evidenced by several of the issues resolved by the CAAF in its decision. *Gray* also reveals a not unusual review process of which counsel must be mindful and be prepared to utilize. Certainly, the military appellate process cannot allow for a death sentence case to work the system *ad infinitum* but practitioners, at the trial and appellate levels, cannot escape the conclusion that the deliberate, thought-out, thoroughly investigated case produces the result that best answers all needs concerned. If that process must take an extra amount of time than does the usual case, then so be it. The alternative, that is, a less-than-reliable result produced by a speedy process, cannot be seen to serve the interests of military justice.

United States v. Curtis and Sentence Reassessment 101: Whose Task Should it Be—the TJAG's or the Service Court's?

In *United States v. Curtis*,[102] the CAAF addresses two issues certified to it by the Judge Advocate General of the Navy in a case where the Navy court had, on remand, affirmed a sentence of life imprisonment.[103] Those issues concerned whether the Navy court was authorized to reassess a death sentence and whether the court had abused its discretion by doing so in this case without instead ordering a sentence rehearing.[104] In a per curiam decision, the court determines that service courts have the requisite authority to reassess death sentences and that the Navy court did not abuse its discretion in so doing without ordering a rehearing.[105] In her dissent, Judge Crawford maintains that while service courts may have the requisite authority to reassess a death sentence, in this case the CAAF, by its remand order, "usurped the role of the Judge Advocate General"[106] and effectively limited the treatment of this case so as to produce a "tainted outcome."[107]

Curtis is the end result of yet another lengthy appellate review that is comprised of multiple opinions and actions by the respective appellate courts. In 1987, a general court-martial convicted then Lance Corporal Curtis of murdering his officer-in-charge and the officer's wife.[108] After multiple reviews and thorough analysis of the numerous issues cited by appellate counsel, the CAAF affirmed the findings and sentence.[109] On reconsideration, however, the CAAF reversed the death sentence on the basis of ineffective assistance of counsel during the sentencing phase of trial.[110] The Navy-Marine court, on remand, affirmed a life sentence, stating that its decision was the result of "a careful review of the entire record and in light of the foregoing [appellate history]."[111]

The CAAF begins its review of the certified issues by noting that the government, in challenging the earlier determination of ineffective assistance of counsel, did not also challenge the remand mandate, and neither government appellate counsel nor the Navy's Judge Advocate General challenged the decision to direct this mandate to the lower court instead of to the Navy Judge Advocate General.[112] Finally, the CAAF also notes that the government did not avail itself of Supreme Court review either of the ineffective assistance of counsel conclusion or of the remand order.[113]

Regarding the first certified issue, the CAAF observes that the UCMJ expressly authorizes the CAAF to "direct" the respective Judge Advocate Generals to return a record of trial to the intermediate service courts "for further review in accordance with the decision of the Court."[114] Coupled with the

102. United States v. Curtis, 52 M.J. 166 (1999).

103. The remand order came from the CAAF's earlier decision wherein the court had reversed the death sentence based upon its determination that Curtis had received ineffective assistance of counsel during the sentencing phase of his court-martial. United States v. Curtis, 46 M.J. 129 (1997). In the decretal paragraph of the decision, the court reversed the lower court's decision as to the sentence and stated: "The record of trial is returned to the Judge Advocate General of the Navy *for remand* to the United States Navy-Marine Corps Court of Criminal Appeals. That court may affirm a sentence of life imprisonment and accessory penalties, or order a rehearing on sentence." *Id.* at 130 (emphasis added).

104. *Curtis*, 52 M.J. at 167.

105. *Id.* at 168, 169.

106. *Id.* at 171.

107. *Id.* at 170.

108. United States v. Curtis, 28 M.J. 1074 (N.M.C.M.R. 1989).

109. United States v. Curtis, 44 M.J. 106 (1996).

110. United States v. Curtis, 46 M.J. 129 (1997).

111. *Curtis*, 52 M.J. at 167 (citing United States v. Curtis, WL 918810, at *2 (N.M.C.C.A. 1998) (unpublished opinion)).

112. *Id.*

113. *Id.*

CAAF decisional law as well as an earlier opinion from the U.S. Supreme Court (wherein the justices held that a service court could reduce a life sentence to a term of years),[115] the statutory authority provides the CAAF with a basis for its holding that service courts may reassess sentences in capital cases.[116] Judge Crawford's dissent concedes that this authority in fact lies within the purview of the service courts.[117]

The CAAF then addresses the issue regarding abuse of discretion and observes that the government has actually demanded an explanation for the decision by the lower court. Even though such an explanation is not generally required of appellate courts, the government maintains that a capital case requires an explanation in order therefore to "ensure public confidence and to ensure that the court has not applied an incorrect legal standard."[118] The CAAF disagrees and, in applying the prevailing view, found that because the Navy-Marine Corps court "was able to discern that the sentence would have been at least life imprisonment," then it was free to reassess the sentence itself instead of ordering a sentence rehearing.[119]

Judge Crawford concedes as well that the lower court did not abuse its discretion but posits that the remand order effectively removed the Navy Judge Advocate General from the reassessment process and turned him instead into nothing more than an errand clerk tasked with a delivery order. In her opinion, the CAAF remand "bypassed the normal comprehensive process" and "assured there would only be a limited review of the sentencing considerations."[120] For Judge Crawford, the normal process (and the one better suited to facilitate public confidence[121]) involves The Judge Advocate General's freedom to direct the case either to a court of criminal appeals or to a convening authority.[122] With this flexibility, the Judge Advocate General has additional resources as well as procedures, evidence and other material all of which is not available to the court. Taken as a whole, the process produces a more comprehensive review that cannot be duplicated solely by directing the matter in the first instance to the court. Judge Crawford concluded that the remand order in *Curtis* deprived the Navy's Judge Advocate General of discretion, flexibility and a more thorough review such that, in the final analysis, the result—while legally permissible—"is most unwise and should be avoided in the future."[123]

As it is consistent with the over-arching concern for result reliability, it appears that Judge Crawford's opinion is more persuasive than the majority's in *Curtis*. In the Crawford approach, when the CAAF determines that a death sentence is a flawed result, it should use its remand power to compel a sentence reassessment that is founded on a thorough re-look at the available evidence, information, and any other relevant material. Short of a sentence rehearing, the only mechanism to obtain that thorough investigation and analysis comes from a convening authority's independent efforts. The intermediate appellate court is constrained by its limitation to a review of the record of trial and cannot duplicate the efforts either of a convening authority or of advocates arrayed in a sentencing rehearing.[124] Surely the interests of military justice and the interests of all parties in ascertaining that "fundamental notions of due process"[125] have been met would be better served by a more comprehensive review. While an intermediate appellate court is authorized to reassess a sentence, the reliability of that conclusion is suspect without the benefit of something more than the record of trial.[126]

114. *Id.* at 168 (citing UCMJ art. 67(e)).

115. *Id.* (citing Jackson v. Taylor, 353 U.S. 569 (1957)).

116. *Id.*

117. *Id.* at 170.

118. *Id.* at 169.

119. *Id.* This rationale comes from the CAAF's decision in *United States v. Taylor*, 47 M.J. 322, 324 (1997), wherein the court held: "When prejudicial error occurs at trial, the Court of Criminal Appeals may reassess the sentence instead of ordering a sentencing rehearing if the court is convinced that appellant's sentence 'would have been at least of a certain magnitude . . . .'" (quoting United States v. Sales, 22 M.J. 305, 307 (C.M.A. 1986)).

120. *Curtis*, 52 M.J. at 170.

121. *Id.*

122. *Id.*

123. *Id.* at 172. Judge Crawford also observes that the court should review its remand order in *Murphy* in order "to allow a full review process to take place." *Id.* at n.1.

124. *See generally* UCMJ art. 66(c) (LEXIS 2000).

125. United States v. Murphy, 50 M.J. 4, 15 (1998).

126. Judge Crawford suggests that a "wide variety of factors" may be examined. These include "newly discovered evidence, post-trial developments such as clarification of the evidentiary and procedural rules, new scientific procedures, availability of witnesses, victim-impact considerations, and the philosophy or purpose behind sentencing." *Curtis*, 52 M.J. at 170.

New Development in Capital Offenses: Additional Aggravating Factor for R.C.M. 1004

Pursuant to Executive Order 13,140, R.C.M. 1004 was recently amended to include an additional aggravating factor the proof of which may authorize a death sentence. This factor, added to the list of aggravating factors found at R.C.M. 1004(c), authorizes a death sentence to be adjudged where the members find beyond a reasonable doubt that the victim of the murder was less than fifteen years of age.[127] Per the executive order, this additional aggravating factor is applicable only to offenses that are committed after 1 November 1999.[128]

Conclusion

The preceding discussion of four capital cases and their recent disposition reveals a review of the basics by the CAAF. *Simoy* highlights the military judge's role, *Murphy* shows deficient performance by defense counsel, *Gray* demonstrates that a lengthy appellate review process serves to enhance appellate conclusions as to factual and legal sufficiency, and *Curtis* discusses the relative strengths and weaknesses of sentence reassessment in the absence of a sentence rehearing. Each case, in turn, provides the capital court-martial advocate the ground rules in several areas. Regarding *Loving*, the ground rules may not be so certain and it remains to be seen whether those rules evolve into something more than a "by-the-book" process.

The cases also convey the prevalent themes that consistently appear in capital litigation. Not only is the issue of the judge's role a viable one but the issue of counsel performance, on the merits and in sentencing, remains persistent. Finally, the lasting impression from an analysis of these cases is the idea that no court-martial death sentence will be executed without having undergone multiple plenary review. The exhaustive and comprehensive process in the military's capital litigation scheme is, unlike that seen too often in the civilian sector,[129] a process that strives ever to reach "result reliability." Anything less than that goal would be antithetical to the due process and fairness guarantees that flow from the UCMJ.

127. Exec. Order No. 13,140, 64 Fed. Reg. 55,115, 55,116 (1999) (citing R.C.M. 1004(c)(7)(K)).

128. *Id.* 64 Fed. Reg. at 55,120.

129. *See generally* William Claiborne, *Illinois Governor, Citing Errors, Will Block Executions*, WASH. POST, Jan. 31, 2000, at A1 (reporting that Illinois Governor George Ryan imposed a moratorium on the imposition of the death penalty in Illinois because of a perceived need to ascertain "that the system is working and that only the clearly guilty are being executed").